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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CALEB BINGHAM,

Defendant and Appellant.

B240699

(Los Angeles County  
Super. Ct. No. TA120460)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Eleanor J. Hunter, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury found defendant and appellant Caleb Bingham (Caleb) guilty of attempted murder and of shooting from a motor vehicle. At his jury trial, prior crimes evidence was admitted. Caleb contends on appeal that admitting the evidence, among other things, was an abuse of discretion and violated his federal constitutional rights. We hold that any error in admitting the evidence did not prejudice him. We therefore affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Factual background.

#### A. *The statements and trial testimony of Clarence and Sheena Paschal.*

On September 17, 2011, around noon, Clarence Paschal<sup>1</sup> was walking with his young daughter when he was shot in the buttock or lower back. The shooting took place near his sister's corner apartment on Parmelee Street in the Nickerson Gardens housing project. Detective Erik Shear investigated the shooting. As part of the investigation, separate interviews with Clarence and his sister, Sheena Paschal, were recorded.<sup>2</sup>

#### 1. Clarence's recorded interview.

The recorded interview with Clarence took place the same day he was shot, after his release from the hospital. Clarence said he was walking with his daughter to Sheena's apartment when he saw Caleb, alone in his car, "coming across." Because he knew Caleb, Clarence tried to flag him down.<sup>3</sup> Sheena called to Clarence, and when he went to her, he heard four to five shots. His back was turned to the street. Because his daughter was near him, Clarence pushed her. Turning, he saw a brown or tan four-door Regal. At the hospital, Sheena told him Caleb was the shooter. Other people also told Sheena "it was Caleb." About six months before he was shot, Clarence and Caleb fought. After the

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<sup>1</sup> Because some witnesses share a surname, we use first names.

<sup>2</sup> The recordings were played for the jury.

<sup>3</sup> At trial, Clarence identified himself as the person waving in video surveillance taken the morning he was shot.

fight, Clarence heard that Caleb wanted to shoot him. Clarence tried to talk to Caleb, who was also Clarence's brother's best friend.

## **2. Sheena's recorded interview.**

The detective interviewed Sheena on October 11, 2011. Saying she was scared to talk to him, Sheena asked the detective to pick her up at school in a plain police car, and she wanted assurance he would be the only person interviewing her. In the interview, Sheena told the detective that on the day of the shooting, Clarence came by her apartment with his daughter and told her he was going to see a movie. He also told her that Caleb "rolled past him and said something to him." Sheena had also seen Caleb drive past, going around on Parmelee, "on the bend," a few times. He was by himself in a car that Sheena had seen him driving in the past.

Clarence was walking away and Sheena was looking out her front door when she saw Caleb shoot at her brother. Caleb moved into another lane to try and get a better angle, and he almost crashed his car. After firing four to five shots from a handgun, he fled around "the bend."

When shown a photographic six-pack during the interview, Sheena circled Caleb's photograph and agreed that she was a 100 percent sure he was the shooter. She also identified Caleb's car from a photograph. According to Detective Shear, at no time during their conversations or recorded interview did Sheena say she had only heard rumors Caleb was the shooter and she didn't see the shooting.

## **3. Clarence's and Sheena's trial testimony.**

At trial, both Clarence and Sheena recanted their statements to Detective Shear, with Clarence denying that he ever talked to the police and that it was his voice on the audiotape. He denied seeing who shot him or any cars at the time of the shooting. He denied that his daughter was with him during the shooting, that his sister told him Caleb was the shooter, and that Caleb wanted to shoot him after their previous fight. Declaring his presence at trial "a waste of my time," he said Caleb wouldn't have shot him because they were good friends, and Caleb was Clarence's brother's best friend. Clarence said

they remained “cool” despite the fight they had in 2010 after Caleb pushed the mother of Clarence’s child.

Although Clarence admitted he was a member of the Bounty Hunters, a Blood gang, he denied knowing what a snitch is and whether Caleb is also a Bounty Hunter. But he did say that a person who identifies in court the person who shot him would be a snitch and could be killed. Clarence also denied that anybody, including Shawn, Caleb’s brother, threatened him. He did see “paperwork” with his name on it at his sister’s house. To save his life, Clarence would do what he had to.

At trial, Sheena testified that Clarence was pushing his daughter in her stroller when she heard four to five gunshots and Clarence yell he’d been shot. She denied seeing any cars on the street at the time of the shooting, although she did tell the detective she saw Caleb alone in a car drive right past her apartment several times before the shooting. At trial, Sheena was unsure if it was the same car driving past. When shown a picture of a car at trial, Sheena was unsure who it belonged to, although she admitted telling the detective it was Caleb’s car. She denied telling the detective she saw Caleb pull out a gun and shoot and get into the wrong lane of traffic to get a better angle. She didn’t tell the detective that the gun was a .45. She didn’t tell her brother at the hospital that Caleb was the shooter.

She knew Caleb from the neighborhood, and she was unaware of any problems between him and Clarence. She did tell the detective, however, that they had a “minor fist fight” in the past, although they had always been friends. Caleb did show her brother a gun after the fight.

Since the shooting, Sheena has tried to move from her apartment on Parmelee because she has a new baby, not because of safety concerns. She doesn’t feel safe because her apartment is in a high crime housing project, and bullets from drive-by shootings might go through the window of her corner apartment. She told the detective something different than at trial because she was scared and, right after the shooting, she was “hearing stuff from off the streets,” like that “Caleb did it.” She heard rumors from “random people off the streets.” She circled Caleb’s photograph and told Detective Shear

that Caleb shot her brother, “based on what I heard. I just knew his name and his face.” She really didn’t see anything.

Sheena didn’t know if Caleb and Clarence are Bounty Hunters. She had not seen her brother’s tattoos. She had not heard what can happen to people who testify against gang members.

Although she saw Shawn at the courthouse and in the neighborhood, they did not talk about the shooting and she was never threatened by either Shawn or Caleb’s girlfriend, in connection with this case.

B. *Gang and other evidence.*

Caleb was arrested on October 13, 2011 after he was spotted driving a brown sedan. When arrested, Caleb said his name was Shawn. Caleb’s car and home were searched, but no evidence was found. Caleb’s car was brownish, tan and looked like the car in surveillance footage from Nickerson Gardens taken the day Clarence was shot. That video surveillance shows a car driving in the manner Sheena described to Detective Shear.

According to Detective Shear, a gang expert, Nickerson Gardens is the “main part” of the Bounty Hunters’s territory.<sup>4</sup> A snitch is someone who gives information about the gang and its criminal activities to the police. Snitching can lead to consequences that include getting beaten and killed. Testifying in court against a gang member is the worst kind of “snitching,” and gang members try to intimidate witnesses. For a gang member to testify is traitorous. Thus, it is very common for witnesses who initially cooperate with the police to become uncooperative.

In Detective Shear’s opinion, Caleb is a Bounty Hunter, and so is his brother, Shawn. Caleb admitted his gang membership to the detective. Clarence, the victim, is also a Bounty Hunter.

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<sup>4</sup> There was no gang allegation, but limited gang evidence was admitted.

During a wiretapped phone call between Caleb and Shawn, Shawn told his brother “you shouldn’t be worried. That ain’t going to court bro. Like hopefully, these motherfuckers ain’t, you know what I mean? And ain’t nobody going to court on you.” “I said hopefully ain’t nobody coming to court on you, they just saying they got witnesses just to say it.” Caleb asked his brother if he “ ‘put that information about who’s telling on me on Facebook?’ ” Shawn said, that he didn’t “ ‘think they’re going to come to court on you.’ ” Caleb and Shawn also discussed getting “paperwork,” which Detective Shear described as proof of snitching. When Caleb referred to a “whip,” a gun, during the conversation, the detective interpreted him to be asking whether a gun was found in his car.

In another wiretapped call, Caleb asked his brother, if Queena (Caleb’s girlfriend) posted that “shit on [F]acebook?” Shawn said he would check, but that he did his “stuff” and would do more later. According to the detective, they were talking about Clarence and getting paperwork on him.

## **II. Procedural background.**

On February 24, 2012, a jury found Caleb guilty of count 1, willful, deliberate and premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664)<sup>5</sup> and found true personal gun-use allegations (§ 12022.53, subds. (b), (c), (d)). The jury also found Caleb guilty of count 2, shooting from a motor vehicle (§ 12034, subd. (c)), and found true a personal gun-use allegation (§ 12022.5, subd. (a)).

On April 20, 2012, the trial court sentenced Caleb, on count 1, to life plus 25 years to life for the gun-use enhancement. The court imposed but stayed sentences on count 2 and the remaining enhancements.

## **DISCUSSION**

### **I. Prior crimes evidence.**

Caleb contends that admitting evidence of his prior criminal history and uncharged crimes was an abuse of the trial court’s discretion and denied him due process and a fair

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<sup>5</sup> All further undesignated statutory references are to the Penal Code.

trial. We agree that the evidence should have been excluded but find that he was not prejudiced by the error in admitting the evidence.

*A. Additional facts.*

Before the audiotape of Clarence's interview was played, defense counsel asked, under Evidence Code section 352, that it be edited to exclude reference to the time Caleb spent in the Youth Authority. The prosecutor said that the reference was "pretty vague" but she did not have a problem with editing it out. But the trial court found that the evidence was not unduly prejudicial. "Also this witness has kind of put the defendant's character into play because he says he's not the type of guy that would do this. [¶] So based on the totality of this witness's testimony, I don't think it's unduly prejudicial, and I will not exclude it under 352."

At trial, Clarence's unedited interview was played for the jury. In it he said, "He [Caleb] known in the projects for—like he a YE baby. We call him a YE baby. He's a youngster that went to YE California Youth Authority." He later repeated that Caleb was "somewhere in YE," and the interrogating officer said, "Right. Right. He's a Youth baby." Clarence also referenced a prior uncharged crime: "He got hurt, from what I heard, from what my baby mama told me today, he got a warrant out for his arrest because he beat up his baby mama. Beat the baby out of her or something like that." When the interrogating officer said, "Wow," Clarence agreed, "Yeah. And they had a house somewhere—I think it was—somewhere out there. But he beat her up and some stuff."

*B. Admission of the prior crimes evidence was not prejudicial.*

We agree that the evidence was either irrelevant or, if relevant, should have been excluded under Evidence Code sections 352 and 1100.

Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The abuse of discretion standard of review applies to a trial court's ruling on the admissibility of evidence, including a ruling concerning relevance. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

A trial court therefore has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Cowan* (2010) 50 Cal.4th 401, 482.)

The relevance of the evidence here at issue is not apparent. Caleb did not testify, and it therefore was not relevant to his credibility or to a material fact in dispute. The trial court, however, found that because Clarence testified that Caleb was not the kind of guy who would shoot him, the prosecutor could introduce evidence Caleb *was* the kind of person who would do this. We see several problems with this reasoning.

First, it appears to be based on Evidence Code section 1102. That section provides, among other things, that evidence of a criminal defendant's character is admissible if the prosecutor offers it to rebut evidence adduced *by the defendant*. (See *People v. Loker* (2008) 44 Cal.4th 691, 709.) The exception in Evidence Code section 1102 does not apply here because defendant did not first introduce evidence of his good character. Rather, Clarence, the prosecutor's witness, testified that Caleb was his friend and wouldn't have shot him.

The second problem is it permitted the admission of character evidence that was relevant only to establish Caleb's propensity for violence. Evidence a defendant committed misconduct other than that currently charged is generally inadmissible to prove conduct on a specified occasion or to show the defendant has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Kelly* (2007) 42 Cal.4th 763, 782.) An exception is where the evidence is relevant to prove, among other things, motive, opportunity, intent, knowledge, preparation, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 400.) No argument was made below that Caleb's commitment to the Youth Authority and his beating his girlfriend so severely that she lost her baby was relevant to prove a material fact such as his intent in this case.

The People, however, argue that the evidence was relevant to "impeach Clarence's testimony" in two ways: first, evidence that Caleb had a violent past rebutted Clarence's testimony that Caleb "wouldn't do nothing like" shoot him; and, second, it explained why



Clarence recanted his prior statement. As to first argument, this just repeats the trial court's incorrect justification for admitting the evidence. As to the second argument, the specific facts that Caleb was in the Youth Authority and beat his girlfriend did not impeach Clarence's testimony. Rather, the evidence showed that Caleb had a violent past, hence, the jury should infer he committed the crime at issue. Evidence Code section 1101, however, does not permit prior crimes evidence to be used for such a purpose. The proper way to impeach Clarence was to introduce his prior inconsistent recorded statement to detectives that Caleb shot him. (Evid. Code, § 1235; *People v. Brown* (1995) 35 Cal.App.4th 1585, 1596-1597.) It was improper to impeach Clarence with Caleb's propensity for violence.

Because the evidence was not admissible, we must determine whether its admission prejudiced Caleb. The admission of prior crimes evidence can be highly prejudicial. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) Prejudice can be alleviated by giving a limiting instruction, such as CALCRIM No. 375.<sup>6</sup> A limiting instruction was not given here.<sup>7</sup> Generally, a court is not required to instruct sua sponte on the limited admissibility of prior crimes evidence. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1094.) An exception is where the past offenses are a dominant part of the evidence against the defendant and is highly prejudicial and minimally relevant. (*Ibid.*) The prior crimes evidence here was not a dominant part of the case. Rather, the references to Caleb's time in the Youth Authority and the beating of his girlfriend were brief and isolated.

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<sup>6</sup> CALCRIM No. 375 directs the jury to consider the evidence only if the People have proved by a preponderance of the evidence that the defendant committed it and to consider it only for a specified limited purpose, such as identity, intent, motive, knowledge, accident, common plan or consent. The evidence is only one factor to consider.

<sup>7</sup> Caleb raises the failure to give the limiting instruction as an additional reason for reversal.

In any event, even in the absence of the limiting instruction, the admission of this evidence did not prejudice Caleb, whether we review prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 (whether it is reasonably probable that a result more favorable to the appellant would result in the absence of the error), or under *Chapman v. California* (1967) 386 U.S. 18, 24 (whether the error was harmless beyond a reasonable doubt) the result is the same. Nor did the admission of the evidence violate Caleb's federal constitutional rights. Even where a trial court renders an erroneous evidentiary ruling, a defendant's due process rights are usually not violated. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 52-53 [such due process claims, usually citing *Chambers v. Mississippi* (1973) 410 U.S. 284, are often overbroad, as *Chambers* was a fact intensive, specific case]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

Both Clarence and Sheena gave separate recorded statements implicating Caleb in the crime. Their statements, made soon after the shooting, matched in material respects. Both saw Caleb drive past Sheena's apartment that morning before the shooting, with Sheena saying she saw Caleb several times. Both heard about the same number of shots: three to five or four to five. After he was shot, Clarence turned and saw a tan or brown car he had seen Caleb driving. Sheena also saw this car, and she identified it from a photograph. Sheena also unequivocally identified Caleb as the shooter.

Other evidence corroborated Clarence's and Sheena's recorded statements. Clarence said he tried to flag Caleb down as he drove past, a fact he denied at trial but that was corroborated by video surveillance showing Clarence waving. Sheena said that after the shooting, Caleb fled in his car around "the bend" on Parmelee. Video surveillance showed a car going away as Sheena described.

Detective Shear explained why Clarence and Sheena retreated from their initial statements: snitching on a gang member could lead to violent retribution. The worst kind of snitching is by a gang member against another gang member. Clarence, like Caleb, was a Bounty Hunter, and Sheena lived in Bounty Hunter territory. Both knew people closely associated to Caleb, including his brother, Shawn. In fact, Clarence admitted he attended court with Shawn. Clarence and Sheena therefore had powerful

reasons to retract their statements—they did not want to be labeled snitches and face the consequences.

Based on this evidence, we conclude that the error in admitting the criminal propensity evidence was harmless.

Caleb, however, contends that his counsel was ineffective for failing to object to the evidence and for failing to request a limiting instruction. (See generally, *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105.) Defense counsel did object to the statements concerning Caleb’s time in the Youth Authority, although he did not object to statements about beating his girlfriend or request a limiting instruction.<sup>8</sup> In any event, because we have found that Caleb was not prejudiced by the admission of the prior crimes evidence, we also reject his claim that his trial counsel was ineffective for failing to object to the evidence or for failing to request the limiting instruction.

#### **DISPOSITION**

The judgment is affirmed.

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.

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<sup>8</sup> The People have therefore asserted that the issue has been forfeited on appeal. Although a defendant generally may not argue on appeal that evidence should have been excluded for a reason not asserted at trial, a defendant may argue that the “asserted error in overruling the trial objection had the legal consequence of violating due process.” (*People v. Partida* (2005) 37 Cal.4th 428, 431.) Because Caleb raises due process concerns, we have addressed the issue.